

International Insolvency Law

JONATHAN L. HOWELL*

Before the late 1970s, little effort was made to adopt a unified mechanism for dealing with international insolvency. Ultimately, however, the increase in corporate globalization and international insolvencies led to the enactment of Section 304 of the U.S. Bankruptcy Code (the "Code") in 1978. While Section 304 allowed U.S. courts to recognize foreign representatives and foreign proceedings, the statute gave U.S. courts great discretion and, thus, created inconsistent jurisprudence. Finally, in 2005, Congress adopted Chapter 15 of the Code, based on the Model Law of International Insolvency, to replace Section 304. Part I of this paper discusses various theoretical principles relating to international insolvencies. Part II examines former Section 304 of the Code and its inconsistent jurisprudence. Part III analyzes the development of a unified insolvency doctrine, the Model Law, and the European Insolvency Regulation. And finally, part IV explores the recently enacted Chapter 15 and its probable impact on international insolvencies.

From the time insolvency law emerged in the fourteenth century until the late 1970s, little effort was made to adopt a unified mechanism for dealing with international insolvency.¹ Although the International Bar Association, the World Bank, and the International Monetary Fund (IMF) all proposed unified insolvency mechanisms, most governments chose not to adopt them due to fear that foreign courts would treat domestic debtors unfairly.² As a result, when a multinational debtor commenced an insolvency proceeding, the event triggered three difficult issues: (1) whether a foreign representative could act in a domestic bankruptcy proceeding; (2) whether the domestic court should recognize foreign ancillary proceedings; and (3) if the domestic court should recognize

* Law Clerk to The Honorable D. Michael Lynn, U.S. Bankruptcy Court, Northern District of Texas, 2007-08. I would like to thank Professor Peter Winship for his guidance, support, and suggestions, Southern Methodist University's Dedman School of Law, the International Law Review Association, and Judge Lynn, Beth Towery, Sandy Maben, and Donna Jordan for their patience, encouragement, and friendship.

1. Evelyn H. Biery, Jason L. Boland, John D. Cornwell, *A Look at Transnational Insolvencies & Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Prot. Act of 2005*, 47 B.C. L. REV. 23, 23-24 (2005).

2. Roland Lechner, *Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 1006 (2002); IMF.org, ORDERLY AND EFFECTIVE INSOLVENCY PROCEDURES, <http://www.imf.org/external/pubs/ft/orderly/index.htm#foreword>; WorldBank.org (last visited Jan. 5, 2008); PRINCIPLES & GUIDELINES, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20196839~pagePK:64065425~piPK:162156~theSitePK:215006,00.html> (last visited Jan. 5, 2008).

foreign ancillary proceedings, whether the domestic court should give deference to conflicting foreign law.³

In 1978, the increase in corporate globalization and international insolvencies led to the enactment of Section 304 of the U.S. Bankruptcy Code (the "Code").⁴ While Section 304 allowed U.S. courts to recognize foreign representatives and foreign proceedings,⁵ the statute gave U.S. courts great discretion in determining whether local creditors were subject to, or shielded from, the proceedings and laws of the foreign court.⁶ Because Section 304 gave U.S. courts great discretion, the courts' application of the statute created inconsistent jurisprudence.⁷

In 2005, Congress adopted Chapter 15 of the Code to replace Section 304.⁸ Based on the Model Law of Cross-Border Insolvency (the "Model Law"), Chapter 15 furthers the effort to unify international insolvency law by requiring U.S. courts to communicate and cooperate with foreign insolvency courts to avoid unnecessary adjudication and application of foreign law.⁹

Part I of this paper discusses various theoretical principles relating to international insolvencies. Part II examines former Section 304 of the Code and its inconsistent jurisprudence. Part III analyzes the development of a unified insolvency doctrine, the Model Law, and the European Insolvency Regulation. And finally, part IV explores the recently enacted Chapter 15 and its probable impact on international insolvencies.

I. International Insolvency Theories: Territorialism and Universalism

International insolvency has taken two varying theoretical approaches throughout its history: territorialism and universalism.¹⁰ The understanding of these theories will give the reader a firm foundation for grasping the current issues surrounding international insolvency. This part of the paper will therefore discuss the meaning, advantages and disadvantages, and the pre-Bankruptcy Code cases of both ideologies.

A. TERRITORIALISM

1. *Meaning*

The theory of territorialism centers upon national sovereignty and the belief that a court's power is limited to its country's jurisdiction and insolvency law.¹¹ Under this approach, a U.S. court presiding over a multinational debtor's reorganization would deal

3. See Jennifer Greene, *Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies*, 30 BROOK. J. INT'L L. 685, 685 (2005).

4. Lesley Salafia, *Cross-Border Insolvency Law in the United States & Its Application to Multinational Corporate Groups*, 21 CONN. J. INT'L L. 297, 297-98 (2006).

5. *Id.* at 298.

6. See 11 U.S.C. § 304 (2005), amended by 11 U.S.C. §§ 1500, *et seq.* (2005).

7. Greene, *supra* note 3, at 699.

8. Biery, *supra* note 1 at 24.

9. *Id.* at 51-52.

10. CHARLES D. BOOTH, *Recognition of Foreign Bankruptcies in a Transnational Setting: An Analysis of the Laws of the United States in 2 THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS* § 9:2 (Ved P. Nanda ed., 2003).

11. Salafia, *supra* note 4, at 299; *id.*

only with U.S. bankruptcy law, U.S. assets, and U.S. creditors.¹² Likewise, a Mexican court, contemporaneously hearing the same multinational debtor's reorganization, would deal only with Mexican insolvency law, Mexican assets, and Mexican creditors.¹³

2. *Advantages and Disadvantages*

The theory of territorialism has both its advantages and disadvantages.¹⁴ The territorial approach allows a domestic court to shield local creditors from biased foreign courts and suspect foreign law.¹⁵ Simultaneously, domestic courts can ensure that local creditors have a fair opportunity to receive a portion of the multinational debtor's assets located in the United States.¹⁶

On the other hand, territorialism has several disadvantages.¹⁷ For example, when applying a territorial approach, courts require multinational debtors to reorganize piecemeal under conflicting laws of several countries.¹⁸ And, because territorialism requires a multinational debtor to commence separate insolvency proceedings in each country, it creates increased costs to both the debtor and the debtor's multinational creditors.¹⁹ Further, individual countries suffer from increased judicial expenses as a result of duplicative insolvency proceedings.²⁰ In sum, a court's decision to adopt a territorial approach, while satisfying the interests of local creditors, will be overly burdensome for the debtor and multinational creditors, result in duplicative proceedings, and unnecessarily dissipate judicial resources.²¹

B. UNIVERSALISM

1. *Meaning*

Unlike territorialism, the theory of universalism hinges upon the cooperation among all countries affected by the administration of a multinational debtor's estate.²² Under this theory, in countries where the debtor has assets, all foreign courts apply the procedural and substantive law of the country hosting the main insolvency proceeding.²³ A trustee will then seek turnover of the debtor's assets worldwide to the main proceeding.²⁴ Thereafter, creditors submit their claims to the main proceeding, and "the final adjudication is to be respected by all other nations."²⁵ Applying universalism to the previous hypothetical, a Mexican court would apply U.S. bankruptcy law and later turn over the multina-

12. See BOOTH, *supra* note 10; see also John A. E. Pottow, *Greed & Pride in International Bankruptcy: The Problems of & Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1904 (2006).

13. See BOOTH, *supra* note 10.

14. See Biery, *supra* note 1, at 25-32.

15. See *id.*

16. Pottow, *supra* note 12, at 1900.

17. See Biery, *supra* note 1, at 25-32.

18. *Id.*

19. See *id.*

20. BOOTH, *supra* note 10.

21. *Id.*; Biery, *supra* note 1, at 25-32.

22. Biery, *supra* note 1, at 29.

23. *Id.*

24. BOOTH, *supra* note 10.

25. *Id.*

tional debtor's Mexican assets to the U.S. trustee.²⁶ Once the U.S. court has decided what share of the proceeds the Mexican creditors will receive, the Mexican court must respect this decision.²⁷

2. *Advantages and Disadvantages*

Like territorialism, universalism has advantages and disadvantages.²⁸ Advantages of universalism include equal sharing of proceeds among creditors, increased proceeds by avoiding unnecessary litigation, and transnational cooperation among courts to attain greater efficiency and certainty for the international marketplace to avoid dissipation of assets.²⁹ The disadvantages of universalism include the inconvenience and hardships incurred by local creditors as a result of traveling to a foreign proceeding and the unfamiliarity of foreign law.³⁰

C. PRE-BANKRUPTCY CODE CASES DEMONSTRATING TERRITORIALISM AND UNIVERSALISM

1. *Territorialism*

Early on, U.S. courts took a territorial approach to international insolvency proceedings, as illustrated in *Harrison v. Sterry*.³¹ There, a trading company by the name of Robert Bird & Co. filed a bankruptcy petition in the United States.³² To collect the debtor's assets located in South Carolina, a group of British creditors subsequently filed suit against the United States and the debtor's U.S. creditors and assignees.³³ In their petition, the British creditors argued that they were entitled to the assets because of an assignment interest created by an agreement with the debtor.³⁴ The United States, however, responded by asserting its own right to these assets, arguing its lien interest had priority over the lien of their British counterparts.³⁵ At trial, the Circuit Court for the District of South Carolina found in favor of the United States, and, as a result, the British creditors appealed.³⁶

On appeal, the Supreme Court affirmed the trial court's holding.³⁷ In deciding that the United States was entitled to priority of payment over the British creditors, the court highlighted the fact that the agreement between the debtor and the English creditors was formed in England and declared that "the bankrupt[cy] law of a foreign country is incapable of operating a legal transfer of property in the United States."³⁸

26. See *id.*

27. See *id.*

28. *Id.*; Biery, *supra* note 1, at 25-32.

29. BOOTH, *supra* note 10.

30. Biery, *supra* note 1 at 29; BOOTH, *supra* note 10.

31. See *Harrison v. Sterry*, 9 U.S. 289 (1809); see also BOOTH, *supra* note 10.

32. *Harrison*, 9 U.S. at **1.

33. *Id.*

34. *Id.* at **9-**10.

35. *Id.* at 298.

36. *Id.*

37. *Id.* at 301.

38. *Id.* at 302.; see also BOOTH, *supra* note 10.

Another case demonstrating the territorial approach pre-Bankruptcy Code is *In re Waite*.³⁹ In that case, a New York firm, Haynes & Sanger made a general assignment after becoming insolvent for the benefit of its creditors to Charles Waite, who was a member of the firm of Pendle & Waite, which had offices in both New York and London.⁴⁰ Later, Pendle & Waite became insolvent as well, commencing liquidation proceedings in the London Court of Bankruptcy.⁴¹ As part of these proceedings, a trustee was appointed to collect the assets of the firm in both England and in the United States.⁴² Notwithstanding the liquidation proceedings, Waite continued to act as an assignee for Haynes & Singer and paid himself \$14,333 under the preference.⁴³ Waite then filed a petition in the Court of Common Pleas of New York City for a settlement of his accounts as assignee.⁴⁴ The foreign trustee, Schofield, appeared in the Court of Common Pleas, arguing that the assignment should be paid to him.⁴⁵ The Court of Common Pleas found the law of New York did not recognize the validity of foreign insolvency proceedings to transfer title to property,⁴⁶ and Schofield subsequently appealed.⁴⁷

The Court of Appeals of New York ruled that Schofield was competent to appear before the court and was the authorized creditor entitled to payment.⁴⁸ The court reasoned that Schofield was the authorized creditor entitled to payment because Waite, who had notice of the foreign liquidation proceeding, was estopped and had no right to make payment to himself.⁴⁹ Specifically, the court held that Schofield was an authorized creditor entitled to the preferential payment of \$14,333 because "no injustice will be done to our own citizens . . . by allowing the transfer to have full effect here."⁵⁰ In other words, the court's conclusion that Schofield was an authorized creditor was contingent upon the fact that no U.S. creditors claimed a right to the preferential payment of \$14,337.⁵¹

2. Universalism

The first case demonstrating a shift in U.S. courts from territorialism to universalism was *Canada Southern Railway v. Gebbard*.⁵² There, a Canadian railroad company filed for reorganization in Canada.⁵³ New York bondholders then filed suit in the United States to recover on their bonds.⁵⁴ But the Supreme Court barred the bondholders' action, ruling that the bondholders were required to assert their claims in the Canadian insolvency pro-

39. See *In re Waite*, 99 N.Y. 433 (1885); see also BOOTH, *supra* note 10.

40. *In re Waite*, 99 N.Y. at 436.

41. *Id.*

42. *Id.*

43. *Id.* at 437.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 438.

48. *Id.* at 451.

49. *Id.*

50. *Id.* at 439.

51. See *id.*; BOOTH, *supra* note 10.

52. See *Canada So. Ry. v. Gebbard*, 109 U.S. 527 (1883); see also BOOTH, *supra* note 10.

53. See *Canada So. Ry.*, 109 U.S. 527. .

54. See *id.* at 535-36.

ceedings.⁵⁵ Although the Court acknowledged that the Canadian laws would change the bondholders' rights to the debtor's assets, the Court held that the bondholders were bound by the Canadian insolvency proceedings because a person who deals with a foreign corporation "impliedly subjects himself to the laws of the foreign government"⁵⁶

After *Gebhard*, the Supreme Court in *Hilton v. Guyot* continued its push towards universalism.⁵⁷ In *Hilton*, the Supreme Court began by promulgating what was then a well-established principle of territorialism: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"⁵⁸ The Court subsequently propounded the now well-known explanation of comity:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative. . . , and to the rights of its own citizens or of other persons who are under the protection of its laws.⁵⁹

After *Hilton*, some cases expanded comity and thus expanded the theory of universalism.⁶⁰ For example, the Court of Appeals for New York in *In re Stoddard and Norske Lloyd Ins.* ordered the assets of a foreign insurance company to be turned over to the primary receiver from Norway despite U.S. creditors' arguments that the court should first satisfy their claims.⁶¹ Relying on the principle of comity, the court reasoned that there was "[no] principle of equity, comity, or public policy which authorizes the application of the funds [for] . . . payment in full of local creditors before transmission of any surplus to the primary or domiciliary receiver."⁶²

II. Section 304

Furthering the move toward universalism, Congress adopted Section 304 of the Code.⁶³ This part of the paper discusses Section 304's purpose, its language, its advantages and disadvantages, and its inconsistent jurisprudence.

A. PURPOSE

Section 304 was adopted by Congress in 1978 as part of the U.S. Bankruptcy Code at the urging of bankruptcy academics and practitioners to "provide a clearer role for the

55. *Id.* at 539.

56. *Id.* at 537; see also BOOTH, *supra* note 10.

57. See *Hilton v. Guyot*, 159 U.S. 113 (1895); BOOTH, *supra* note 10.

58. *Hilton*, 159 U.S. at 163.

59. *Id.* at 163-64; see also BOOTH, *supra* note 10.

60. See *In re Stoddard and In re Norske Lloyd Ins.*, 242 N.Y. 148 (1926); see also BOOTH, *supra* note 10.

61. *In re Stoddard and In re Norske Lloyd Ins.*, 242 N.Y. at 168.

62. *Id.* at 163; see also BOOTH, *supra* note 10.

63. Salafia, *supra* note 4, at 297.

U.S. bankruptcy courts in cross-border insolvencies.”⁶⁴ Section 304’s legislative purpose was to empower U.S. courts in the administration of bankruptcies ancillary to foreign insolvency proceedings.⁶⁵

B. STATUTORY LANGUAGE

Section 304 was broken up into three subsections: (a), (b), and (c). Subsection (a) gave foreign representatives⁶⁶ the authority to file a petition with a U.S. court if that court was hearing a case ancillary to a foreign proceeding.⁶⁷ Following the foreign representative’s filing of a petition, subsection (b) provided the court with power to grant the following forms of relief: (1) enjoin or continue any action against the debtor with respect to property involved in a foreign proceeding, (2) enjoin or continue any action against property involved in a foreign proceeding, (3) enjoin or continue the enforcement of any judgment against the debtor or a judicial proceeding to create or enforce a lien against the foreign estate, (4) order turnover of proceeds or property of the foreign estate to the foreign representative, or (5) order “other appropriate relief.”⁶⁸

Finally, subsection (c) set forth six factors meant to guide the court in deciding which form of relief “will best assure an economical and expeditious administration of [the foreign] estate.”⁶⁹ The six factors were:

- (1) Just treatment of all holders of claims against or interests in such estate;
- (2) Protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) Prevention of preferential or fraudulent dispositions of property of such estate;
- (4) Distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) Comity; and
- (6) If appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.⁷⁰

C. ADVANTAGES AND DISADVANTAGES

Congress’ enactment of Section 304 brought several advantages.⁷¹ A foreign representative finally had clear statutory authority, as opposed to judge-made law, allowing him or

64. Paul L. Lee, *Ancillary Proceedings under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 115 (2002).

65. *Id.*

66. A “foreign representative” was defined as a “duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.” 11 U.S.C. § 101(24) (2005).

67. A “foreign proceeding” was defined as any judicial or administrative proceeding, bankruptcy or otherwise, “in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.” § 101(23); 11 U.S.C. § 304(a) (2005).

68. § 304(b).

69. § 304(c).

70. *Id.*

71. See Biery, *supra* note 1, at 32-33; Salafia, *supra* note 4, at 297-98.

her to be heard in an ancillary case.⁷² Likewise, the enactment of Section 304 gave U.S. courts specific statutory guidelines in determining what relief to grant in such cases.⁷³

But, Section 304 also had serious disadvantages.⁷⁴ Most notably, before Section 304's enactment, many bankruptcy courts were moving toward a more universal approach—that is, they were already recognizing the right to hear foreign representatives and ordering the turnover of domestic assets.⁷⁵ Yet, Section 304 forced these courts to once again consider territorial ideals.⁷⁶

D. INCONSISTENT JURISPRUDENCE

1. Cause

Section 304's lack of clarity allowed bankruptcy courts to create inconsistent jurisprudence. Instead of using concrete instructions regarding when bankruptcy courts should grant a foreign representative relief, Section 304 included a balancing test in subsection (c).⁷⁷ The balancing test required bankruptcy courts to consider both universal and territorial ideals when deciding whether to grant relief.⁷⁸ Essentially, the balancing test gave bankruptcy courts great discretion and support to grant a remedy in line with whatever theoretical approach they favored (whether universal or territorial).⁷⁹ Accordingly, courts that were reluctant to break with a territorial approach denied relief based on priority under the Code or based on the prejudice and inconvenience suffered by U.S. creditors by the foreign court's processing of U.S. claims.⁸⁰ Likewise, courts that favored a universal approach would grant relief and support their decision based on the principles of comity, the just treatment of all holders of claims, the prevention of preferential or fraudulent dispositions, and the provision of an opportunity for a fresh start for the foreign debtor.⁸¹

2. Cases

Several cases illustrate the split in jurisprudence between courts that took a territorial approach and those that took a universal approach following Section 304's enactment.⁸² This part of the paper will briefly discuss cases illustrating the courts' inconsistent application of section 304.

72. See § 304.

73. See *id.*

74. Greene, *supra* note 3, at 686-87; Salafia, *supra* note 4, at 298.

75. See *In re Toga Mfg.*, 28 B.R. 165, 170-171 (Bankr. E.D. Mich.1983); *In re Lineas Areas de Nicaragua*, 13 B.R. 779, 780-781 (Bankr. S.D. Fl. 1981).

76. See Greene, *supra* note 3, at 703-05.

77. *Id.* at 687.

78. *Id.*

79. *Id.*

80. See § 305(c).

81. See *id.*

82. Compare *In re Toga Mfg.*, 28 B.R. at 167-168, with *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 454-55 (2d Cir. 1985).

a. Territorial Cases

A case that demonstrates a bankruptcy court's universal application of Section 304 is *In re Toga Mfg.*⁸³ In that case, an American creditor, Peter T. Hesse Enterprises, received an arbitration award against a Canadian bankruptcy debtor, Toga Manufacturing Limited.⁸⁴ Hesse subsequently filed a claim in a Michigan county court to enforce the award.⁸⁵ Seeking to resolve the debtor's bankruptcy case in Canada, the foreign trustee filed a petition under Section 304(a) in the bankruptcy court for the Eastern District of Michigan, requesting an order enjoining the state court action and turnover of Toga's U.S. funds.⁸⁶

In deciding whether to grant relief, the bankruptcy court first determined that, while Hesse's claim would not have priority under the Canadian Bankruptcy Act, it would have priority under the U.S. Bankruptcy Code.⁸⁷ As a result, the court denied the foreign trustee's petition, concluding that Hesse would receive unequal treatment in the Canadian bankruptcy proceeding, and, in order to protect Hesse from a foreign judgment inconsistent with American policies, the claim needed to remain within the United States.⁸⁸

Similarly, the Bankruptcy Court for the Southern District of Florida took a territorial approach when applying Section 304 in *In re Lineas Areas de Nicaragua S.A.*⁸⁹ There, the debtor, a Nicaraguan airline, commenced foreign proceedings in Nicaragua.⁹⁰ Soon thereafter, a foreign trustee filed a petition under Section 304(a) with the bankruptcy court, seeking turnover of the debtor's U.S. assets as well as injunctive relief to stay all U.S. litigation against the debtor or its property.⁹¹ The bankruptcy court ordered the turnover.⁹² But, the order stipulated that the debtor's assets, totaling \$203,000, would be used to first satisfy U.S. creditors' claims.⁹³ Because the U.S. creditors' undisputed claims exceeded the total value of the debtor's U.S. assets, the order was virtually worthless to non-U.S. creditors.⁹⁴ Moreover, the court made turnover contingent upon prohibiting the foreign trustee from assigning, encumbering, or abandoning the U.S. assets.⁹⁵ Later, the court also appointed an independent co-trustee to supervise the debtor's position regarding a potential purchase of the debtor's most valuable U.S. asset, its 402 certificate, which effectively allowed the Nicaraguan debtor to operate in the United States.⁹⁶

b. Universal Cases

In re Culmer illustrates the courts' universal application of Section 304.⁹⁷ In that case, Banco Ambrosiano Overseas Limited (BAOL), a banking company organized under the

83. See *In re Toga Mfg.*, 28 B.R. at 167-168.

84. *Id.* at 165.

85. *Id.* at 165-66.

86. *Id.* at 166-67.

87. *Id.* at 167-70.

88. *Id.* at 170; see also Biery, *supra* note 1, at 41-42.

89. See *In re Lineas Areas de Nicaragua*, 13 B.R. at 779.

90. *Id.* at 779.

91. *Id.* at 780.

92. *Id.*

93. *Id.*

94. *Id.* at 780-81.

95. *Id.*

96. *Id.*

97. See *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

laws of the Bahamas, filed a voluntary wind-up application with the Bahamas Supreme Court.⁹⁸ At the time of the filing, BAOL maintained clearing, custodial, and brokerage accounts at banks and financial institutions located in the Southern District of New York, despite not doing any business in the United States.⁹⁹ As such, BAOL filed a Section 304 petition in the Southern District of New York requesting injunctive relief and turnover of its U.S. assets to the Bahamas for administration in the Bahamian liquidation proceeding in accordance with Bahamian law.¹⁰⁰ U.S. creditors, however, opposed BAOL's request, arguing that their interests should have been determined under U.S. law.¹⁰¹ After applying Section 304(c), the bankruptcy court found that BAOL had met all six factors.¹⁰² Because the record was devoid of any evidence of prejudice, and because BAOL made sure it had satisfied all the legal requirements for affording comity, the court granted the foreign representative's petition.¹⁰³

Like the court in *In re Culmer*, the Second Circuit Court of Appeals in *In re Cunard Steamship Co.* also applied a universal approach to Section 304.¹⁰⁴ In that case, Salen Reefer Services, a Swedish corporation, commenced a bankruptcy proceeding in the Stockholm City Court in the Kingdom of Sweden.¹⁰⁵ In accordance with Swedish law, a trustee was appointed to oversee Salen's dealings.¹⁰⁶ Later, Cunard Steamship commenced an action in the Southern District of New York against certain assets of Salen based on an order of attachment.¹⁰⁷ Salen then filed a motion by order to show cause seeking to dissolve the attachment.¹⁰⁸ After a hearing, the district court granted Salen's motion and vacated the attachment, holding that granting comity to the Swedish court's stay on creditor actions during the Swedish bankruptcy proceeding would further the public policy of the United States.¹⁰⁹ Cunard then appealed the district court's decision.¹¹⁰

On appeal to the Second Circuit, Cunard argued that the district court erred by vacating the attachment because the decision was not based on the court's application of Section 304.¹¹¹ The court held that Congress had not intended Section 304 to be the exclusive remedy to creditors.¹¹² The court further determined the district court did not abuse its discretion to vacate the attachment and grant comity to pending Swedish bankruptcy proceedings.¹¹³ In coming to this conclusion, the court relied on the Supreme Court's decision in *Hilton*, providing that U.S. courts should grant comity "to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent

98. *Id.* at 623.

99. *Id.*

100. *Id.* at 624.

101. *Id.* at 627.

102. *Id.* at 628-29.

103. *Id.* at 633.

104. See *Cunard S.S. Co.*, 773 F.2d at 454.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 459.

112. *Id.*

113. *Id.*

jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated."¹¹⁴

Similarly, the Bankruptcy Court for the District of New York applied Section 304 in a universal manner in *In re Gee*.¹¹⁵ There, Universal Casualty & Surety Co., a reinsurance company domiciled in the Cayman Islands, underwent involuntary insolvency proceedings in the Grand Court of the Cayman Islands.¹¹⁶ The Grand Court appointed Allen Gee as the official liquidator.¹¹⁷ In response to the involuntary proceeding, Universal filed a voluntary Chapter 11 petition in the Southern District of New York.¹¹⁸ Consequently, Gee filed a Section 304 petition in that court.¹¹⁹ Gee's petition sought various forms of relief including document production relating to Universal's U.S. assets, a preliminary injunction prohibiting Universal's New York directors and shareholders from disposing company records, and orders directing Universal to turnover U.S. assets to Gee.¹²⁰

At a subsequent hearing to determine the validity of Universal's Chapter 11 petition and Gee's Section 304 requests, several arguments were made.¹²¹ Gee, joined by the U.S. trustee, argued that the court should dismiss Universal's Chapter 11 petition due to the foreign ancillary proceeding and the fact that Universal was ineligible as a Chapter 11 debtor.¹²² Universal, however, contended that it filed its Chapter 11 petition in good faith, its petition superseded Gee's Section 304 petition, Gee's Section 304 petition failed to meet subsection (c)'s four universal factors, and Gee could not petition for relief unless the court accorded Universal Chapter 11 relief.¹²³

Despite Universal's arguments, the bankruptcy court granted Gee, as the foreign representative, relief under Section 304 and dismissed Universal's Chapter 11 petition.¹²⁴ The court reasoned that a debtor need not have U.S. assets nor be eligible for Chapter 11 relief in order for it to be subject to a Section 304 case, and there was no basis for concluding a Chapter 11 petition superseded a Section 304 petition.¹²⁵ Rather, the court provided that Gee had a right to relief for purposes of discovery because the foreign proceeding would neither prejudice U.S. creditors nor create unjust treatment to the estate's creditors and because, under Cayman insolvency law, distributions of the estate would be substantially in accordance with the U.S. Bankruptcy Code.¹²⁶

114. *Id.* at 457.

115. See *In re Gee*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985).

116. *Id.* at 894.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 898-903.

122. *Id.* at 899.

123. *Id.* at 896-904.

124. *Id.* at 905.

125. *Id.* at 899-905.

126. *Id.* at 903-05.

III. The Creation of a Uniform Insolvency Doctrine, the Model Law on Cross-Border Insolvency, and the European Insolvency Regulation

A. THE CREATION OF A UNIFORM INSOLVENCY DOCTRINE

1. *International Dilemma*

While Section 304 gave bankruptcy courts authority to recognize, as well as defer to, ancillary foreign insolvency proceedings, the statute failed to address the core problem in international insolvencies—the absence of a unified insolvency mechanism.¹²⁷ As a result, most multinational debtors and creditors found asset distribution arising from international insolvency proceedings to be unpredictable.¹²⁸ Congress, however, was slow to respond these concerns.¹²⁹

2. *International Response*

a. The World Bank

Unlike Congress, international intergovernmental organizations (IGOs) became increasingly involved in addressing the absence of a predictable, unified insolvency mechanism.¹³⁰ For example, in 2001, the World Bank published principles and guidelines for effective insolvency and creditors rights systems (Principles and Guidelines).¹³¹ Principles and Guidelines consisted of a collection of international “best practice” methods for insolvencies and creditors rights systems.¹³² Its purpose was to guide reform and benchmarking in developing countries.¹³³ Adopting a universal approach, Principles and Guidelines emphasized contextual, integrated solutions and the policy choices involved in developing such solutions.¹³⁴ After publishing Principles and Guidelines, the World Bank implemented its methods in a series of experimental country assessments.¹³⁵

b. IMF

In addition to the World Bank’s Principles and Guidelines, the IMF published “Orderly and Effective Insolvency Procedures” (OEIP). Similar to Principles and Guidelines, OEIP acknowledged the importance of strengthening the global marketplace by creating a predictable international insolvency mechanism for the benefit of both multinational

127. Biery, *supra* note 1, at 48.

128. *Id.*; see also Salafia, *supra* note 4, at 298–99.

129. Congress did not respond to the absence of a unified international insolvency mechanism until enacting Chapter 15 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act in October 2005. See 11 U.S.C. § 1501 (2005).

130. WorldBank.org, *Principles & Guidelines*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20196839~pagePK:64065425~piPK:162156~theSitePK:215006,00.html> (last visited Feb. 1, 2008).

131. *Id.*

132. *Id.*

133. United Nations Comm’n on Int’l Trade Law, *2004-UNCITRAL Legislature Guide on Insolvency Law*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html (last visited Feb. 1, 2008).

134. *Id.*

135. *Id.*

debtors and creditors.¹³⁶ Unlike Principles and Guidelines, however, OEIP did not attempt to establish particular methods.¹³⁷ Instead, the IMF limited OEIP to major policy choices that countries should address when designing a system, irrespective of a country's stage in global development.¹³⁸

c. UNCITRAL

At the urging of practitioners and countries like Australia and after recognizing efforts by other IGOs, the United Nations Commission on International Trade Law (UNCITRAL) began contemplating the idea of drafting a model law on international insolvency.¹³⁹ While national differences in approaching insolvency law and policies created a substantial opposition to creating a model law, UNCITRAL pushed forward by establishing an exploratory committee and later the Working Group on Insolvency.¹⁴⁰

Over the next two years, the Working Group drafted the text of the model law at each meeting.¹⁴¹ Representatives from thirty-six UNCITRAL member countries, forty observer states, and thirteen international organizations, representing practitioners, judges, and lenders, attended these meetings.¹⁴² The Working Group created the model law for international insolvencies fairly quickly, and on May 30, 1997, the Working Group presented a finalized version of the Model Law, which UNCITRAL later endorsed.¹⁴³

B. THE MODEL LAW ON CROSS-BORDER INSOLVENCY

1. Purpose

In short, the purpose of the Model Law is to assist countries in developing a modern, harmonized, and fair framework for cross-border insolvencies.¹⁴⁴ It attempts to achieve this goal by respecting the differences between national procedural laws and not addressing issues of substantive law.¹⁴⁵ Additionally, the Model Law's preamble expressly provides that it strives to promote: (1) cooperation between courts and other competent authorities where the debtor has assets, (2) greater certainty for trade and investment, (3) fair and efficient administration, (4) fortification and value maximization of the debtor's assets, and (5) successful financial reorganization of troubled businesses.¹⁴⁶

136. IMF.org, *Orderly and Effective Insolvency Procedures*, <http://www.imf.org/external/pubs/ft/orderly/index.htm#foreword> (last visited Feb. 1, 2008).

137. *Id.*

138. *Id.*

139. Australian Gov. Treasury, *Cross-Border Insolvency and the UNCITRAL Model Law*, <http://www.treasury.gov.au/documents/448/HTML/docshell.asp?URL=4CrossBorder.asp> (last visited Feb. 1, 2008).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Cross-Border Insolvency Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 361, 365 (2004).

145. Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 317 (2004).

146. U.N. Comm'n on Int'l Trade Law, *Model Law on Cross-Border Insolvency*, 36 I.L.M. 1386, pmbl. (1997) [hereinafter "Model Law"].

2. *Scope*

The scope of the Model Law is very broad.¹⁴⁷ Essentially, it extends to any foreign proceeding relating to the debtor's insolvency, where the debtor's assets and affairs are under the jurisdiction of a foreign court.¹⁴⁸ The Model Law, however, applies solely to collective creditor actions and, therefore, excludes actions brought by individual creditors.¹⁴⁹ Under this criteria, a variety of proceedings would be eligible for recognition, whether compulsory or voluntary, an organization or an individual, a winding-up, or a reorganization.¹⁵⁰

3. *Content*

a. Access by Foreign Representatives

A critical aim of the Model Law is to provide foreign representatives with expedited and direct access to the insolvency proceeding in the enacting country (local proceeding).¹⁵¹ Therefore, it does not demand that foreign representatives employ letters rogatory or other cumbersome and time-consuming diplomatic instruments.¹⁵² Additionally, under the Model Law, a foreign representative has procedural standing to initiate a local proceeding upon recognition of the court of the enacting country (local court).¹⁵³ Thereafter, the foreign representative may participate in a local proceeding and intervene in such proceedings concerning individual actions affecting the debtor or its assets.¹⁵⁴

b. Access by Foreign Creditors

Like foreign representatives, the Model Law also allows foreign creditors access to the local court for the purpose of initiating, or taking part in, an insolvency proceeding.¹⁵⁵ It does so under the express principle that the local court should treat foreign creditors equal to creditors of the enacting state (local creditors).¹⁵⁶ Allowing foreign creditors to participate in the local proceeding takes into consideration the fact that foreign creditors have a sincere economic interest in the outcome of the local proceeding.¹⁵⁷

A foreign creditor's primary challenge in many local proceedings is receiving treatment equal to local creditors, especially with respect to priority of claims.¹⁵⁸ Some laws governing insolvency grant a higher ranking to a local creditor than a foreign creditor with

147. Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. CORP. L. 709, 711 (1999).

148. United Nations Comm'n on Int'l Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited Feb. 1, 2008) [hereinafter "Cross-Border Insolvency Guide"].

149. Cronin, *supra* note 147, at 712.

150. Clift, *supra* note 145, at 319.

151. Cross-Border Insolvency Guide, *supra* note 148, at 373.

152. *Id.*

153. Clift, *supra* note 145, at 321.

154. Cross-Border Insolvency Guide, *supra* note 148, at 373.

155. Cronin, *supra* note 147, at 713.

156. *See id.*

157. *See* Clift, *supra* note 145, at 321.

158. *Id.*

similar claims.¹⁵⁹ While the Model Law requires equal treatment of foreign creditors, it also provides that this requirement need not extend to priority of claims in insolvency proceedings.¹⁶⁰ Instead, the law of the enacting state (local law) determines priority of the foreign creditor's claims, with the stipulation that the foreign creditor deserves a minimum level of treatment.¹⁶¹ Specifically, the local court should treat the foreign creditor at least as well as a general unsecured creditor if a comparable local claim would receive the same treatment.¹⁶²

c. Recognition of a Foreign Proceeding

The Model Law establishes requirements for the local court in determining recognition of the foreign proceeding, stating that the local court may grant temporary relief before recognition is determined in appropriate circumstances.¹⁶³ Under the Model Law, once a foreign representative files an application for recognition with the local court, he or she must provide certified documents of the decision commencing the foreign proceeding and appointing the representative.¹⁶⁴ Alternatively, the foreign representative may provide any other evidence acceptable to the court demonstrating the foreign proceeding's existence and appointing the foreign representative.¹⁶⁵ While the Model law recognizes the need to translate the documents into the language of the enacting country, it does not require the foreign representative to do so.¹⁶⁶ Although local law governs when notice should be given to parties in interest, the Model Law requires the local court provide individual notice to foreign creditors when it reaches a decision regarding recognition.¹⁶⁷ This additional notice obligation helps promote foreign creditor participation in the local proceeding.¹⁶⁸ Notice must include the time and place for foreign creditors to file claims in addition to whether secured creditors must file claims.¹⁶⁹

By filing for recognition with the local court of the enacting state, however, the foreign representative does not ensure that the local court will have jurisdiction over all of the debtor's assets and affairs.¹⁷⁰ Instead, recognition determines whether the foreign proceeding is a foreign "main" proceeding or a foreign "non-main" proceeding.¹⁷¹ Under the Model Law, a foreign proceeding is a main proceeding if the debtor has its center of its main interest ("COMI") in the country where the foreign proceeding is taking place.¹⁷² The Model Law explains that the phrase COMI is assumed to be—absent evidence to the contrary—the debtor's habitual residence or registered office in the country where the foreign court resides.¹⁷³

159. *Id.*

160. *Id.*

161. Model Law, *supra* note 146, art. 13(2).

162. *Id.*

163. Cross-Border Insolvency Guide, *supra* note 148, at 374.

164. Model Law, *supra* note 146, art. 15(2)(a)-(b).

165. *Id.* art. 15(2)(c).

166. Clift, *supra* note 145, at 322.

167. *Id.* at 322-23.

168. *Id.* at 323.

169. Model Law, *supra* note 146, art. 14(3)(b).

170. Clift, *supra* note 145, at 323.

171. Cross-Border Insolvency Guide, *supra* note 148, at 428.

172. Model Law, *supra* note 146, art. 16(3).

173. Clift, *supra* note 145, at 323.

If, however, the foreign proceeding commenced in a country where the debtor does not have its COMI but has an established presence, then the foreign proceeding is a foreign non-main proceeding.¹⁷⁴ And, if the foreign proceeding commenced in a country where the debtor neither has its COMI nor an established presence, then it does not qualify for recognition in the local country that has enacted the Model Law.¹⁷⁵

d. Relief from an Application for Recognition

With respect to relief, the purpose of the Model Law is to implement effects upon recognition of the foreign proceeding thought necessary for expediting a fair and orderly cross-border insolvency proceeding.¹⁷⁶ Because the Model Law considers certain effects as necessary for a fair and orderly cross-border insolvency proceeding, these effects are made standard after recognition, rather than importing the consequences of the foreign law into the insolvency system of the exporting country.¹⁷⁷

Although the local court must determine recognition promptly, the Model Law takes into consideration situations where the local court may need to grant relief before determining recognition.¹⁷⁸ Such relief may be necessary to protect the debtor's assets or the creditor's interests.¹⁷⁹ Temporary relief may include staying an execution against the debtor's assets, entrusting the administration or realization of the debtor's assets to the foreign representative to protect and preserve the value of the assets, suspending the right to transfer, encumber, or otherwise dispose of any asset of the debtor, and the examining of a witness and the taking of evidence.¹⁸⁰ Notwithstanding the wide range of temporary relief, it is unlikely that the local court will grant relief if it interferes with the foreign proceeding's administration.¹⁸¹

In addition to temporary relief, the Model Law also implements some standard forms of relief that flow automatically once the local court recognizes the foreign main proceeding.¹⁸² These standard forms of relief include the stay of all actions concerning the debtor's assets, rights, allegations, or liabilities, unless such action is necessary to preserve a claim against the debtor.¹⁸³ Additionally, the local court will suspend the rights of persons to transfer, encumber, or otherwise dispose of any the debtor's assets.¹⁸⁴ The local laws governing stay and suspension, however, may supersede these effects under the Model Law.¹⁸⁵

Along with certain standard effects, the Model Law allows the local court to impose discretionary forms of relief.¹⁸⁶ Such discretionary relief is among the most frequently

174. *Id.*

175. *Id.*

176. Cross-Border Insolvency Guide, *supra* note 148, at 411.

177. *Id.*

178. *Id.* at 409.

179. *Id.*

180. Clift, *supra* note 145, at 324.

181. Model Law, *supra* note 146, art. 19(4).

182. Cross-Border Insolvency Guide, *supra* note 148, at 411.

183. Clift, *supra* note 145, at 324.

184. *Id.*

185. *Id.* at 429.

186. Model Law, *supra* note 146, art. 21.

used in insolvency proceedings.¹⁸⁷ One form of relief that is afforded upon recognition is the stay of actions or enforcement proceedings against the debtor or the debtor's assets.¹⁸⁸ Another key form of relief is the suspension of the right to transfer, which freezes the flow of money and property across borders.¹⁸⁹ This suspension reduces the risk of fraudulent transfers and maximizes the likelihood that the courts can satisfy parties-in-interest (i.e., parties who have a recognizable stake in the debtor's insolvency proceeding).¹⁹⁰

Local law governs prohibitions and exclusion to the stay.¹⁹¹ Such exclusions may relate to payments by the debtor in the ordinary course of business, the completion of open market transactions, or exclusions that relate to the enforcement of secured claims.¹⁹²

Upon the application of a foreign non-main proceeding, the local court may grant the same temporary forms of relief that are available to a foreign main proceeding.¹⁹³ In addition, the Model Law permits the local court to grant discretionary forms of relief.¹⁹⁴ Such relief may encompass appointing a person to administer all or part of the debtor's assets, creating access to information about those assets, and any other type of relief under local law.¹⁹⁵ Relief accorded to a foreign non-main proceeding is restricted to those assets or transactions that the local court determines have a significant connection with non-main proceeding on the basis of the local law.¹⁹⁶

e. Protection of Parties-in-Interest

The Model Law also provides protection for creditors and other parties-in-interest.¹⁹⁷ The policy underlying this principle is that there should be a balance between relief that courts grant to a foreign representative and the interests likely affected by such relief.¹⁹⁸ Under this provision, the local court must determine whether it has adequately protected the parties' interests before it grants relief or imposes the effects of recognizing a foreign main proceeding.¹⁹⁹ If the local court decides an interested party is not adequately protected, it may impose other types of relief it deems appropriate, including modifying or terminating the temporary stay or initiating avoidance actions under local insolvency law.²⁰⁰ Furthermore, the Model Law expressly provides that a foreign representative has standing to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors.²⁰¹

187. Cross-Border Insolvency Guide, *supra* note 148, at 469.

188. Model Law, *supra* note 146, art. 21(1)(a).

189. *Id.* art. 21(1)(c).

190. Clift, *supra* note 145, at 325.

191. *See id.*

192. *Id.*

193. Model Law, *supra* note 146, art. 19.

194. *Id.*

195. Clift, *supra* note 145, at 326.

196. Model Law, *supra* note 146, art. 21(3).

197. *Id.* at 22.

198. Cross-Border Insolvency Guide, *supra* note 146, at 470.

199. *Id.*

200. Model Law, *supra* note 146, art. 22(2).

201. Cross-Border Insolvency Guide, *supra* note 148, at 472.

f. Coordination and Cooperation

One instrumental area of the Model Law addresses coordination and cooperation.²⁰² This part of the Model Law enables local and foreign courts and representatives to efficiently achieve optimum results.²⁰³ In addition, coordination and cooperation between local and foreign courts and representatives maximizes asset value while minimizing litigation, expense, and delay.²⁰⁴

To ensure coordination and cooperation, the Model Law requires the local court and local representative of the enacting country to cooperate with the foreign court and foreign representative "to the maximum extent possible."²⁰⁵ To facilitate coordination, specifically, the Model Law authorizes direct communication, including requests for assistance between the local court and its representative and the foreign courts and their representatives.²⁰⁶ For purposes of cooperation, the Model Law gives the local court authority to implement a wide range of tools, including: appointment of a person or body to act at the direction of the court, communication by any appropriate means, administration and supervision of the debtor's assets, coordination of concurrent proceedings regarding the same debtor, and implementation of agreements regarding coordination of proceedings.²⁰⁷

g. Concurrent Proceedings

Finally, the Model Law recognizes the importance of coordination and cooperation between courts when the debtor is concurrently participating in the local insolvency proceeding and one or more foreign proceedings.²⁰⁸ Coordination and cooperation is particularly important in this context because fundamental differences between varying insolvency laws can create a power struggle for control over assets and, eventually, their mode of distribution.²⁰⁹

If the local court has recognized a foreign main proceeding, a local insolvency proceeding may commence if the debtor has assets in the enacting country.²¹⁰ The local court must usually restrict the effects of the local proceeding to the debtor's domestic assets.²¹¹ But, the Model Law allows for exceptions if considered necessary to implement cooperation and coordination, and distribution of the assets is permitted under local law.²¹² In some situations, however, a meaningful administration of the local insolvency proceeding may need to include specific foreign assets of the debtor, particularly when there is no

202. Clift, *supra* note 145, at 327.

203. *Id.*

204. *Id.*

205. Model Law, *supra* note 146, art. 25(1).

206. *Id.* art. 25(2).

207. *Id.* art. 27.

208. Cross-Border Insolvency Guide, *supra* note 148, at 425.

209. Clift, *supra* note 145, at 328.

210. Model Law, *supra* note 146, art. 28.

211. Cross-Border Insolvency Guide, *supra* note 148, at 426.

212. See Model Law, *supra* note 146, at 328.

foreign proceeding in the country where these assets are situated.²¹³ These restrictions are useful in preventing conflicts of jurisdiction.²¹⁴

Under the Model Law, the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding.²¹⁵ As such, the local court of the enacting country may provide relief in favor of the foreign proceeding in all circumstances.²¹⁶ Whether the foreign proceeding is main or non-main, relief granted to the foreign proceeding following recognition must be consistent with the local proceedings.²¹⁷ Similarly, the local court will review relief that it has already granted to make sure such relief is consistent with the local proceeding.²¹⁸ Also, if the foreign proceeding is a main proceeding, then the local court must modify those effects that flow automatically, upon recognition, that are inconsistent with the foreign proceeding.²¹⁹ And, if a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, then these effects do not automatically flow to the foreign proceeding.²²⁰

Following recognition, the Model Law also aids in the coordination and cooperation between two or more foreign proceedings of the same debtor and the foreign representative.²²¹ In such cases, the local court of the enacting country has a duty to ensure coordination and uniformity between it and the foreign proceedings.²²² The Model Law helps achieve uniformity in this regard by making sure creditors that have already received payment in the foreign proceedings do not receive additional payment until similarly situated creditors have an equivalent distribution in the local proceeding.²²³

4. *Adoption*

Since UNCITRAL endorsed the Model Law, several countries have adopted legislation based on the Model Law.²²⁴ These countries include the United States, Japan, Mexico, Poland, Romania, Montenegro, Serbia, South Africa, Great Britain, and the British Virgin Islands.²²⁵

5. *Jurisprudence*

Because most countries have adopted the Model Law within the past year, there is only one case that has employed the Model Law thus far—the *Xacur* case.²²⁶ In the *Xacur* case, three Mexican brothers, Jacobo, Felipe, and Jose Xacur, borrowed more than \$300

213. Cross-Border Insolvency Guide, *supra* note 148, at 426.

214. *Id.* at 427.

215. Model Law, *supra* note 146, art. 29.

216. Cross-Border Insolvency Guide, *supra* note 148, at 428.

217. *Id.*

218. Model Law, *supra* note 146, art. 29(b)(i).

219. *Id.* art. 29(b)(ii).

220. *Id.* art. 427(a)(ii).

221. Cross-Border Insolvency Guide, *supra* note 148, at 429.

222. Model Law, *supra* note 146, art. 30.

223. *See id.*

224. *See* UNCITRAL.org, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Feb. 1, 2008).

225. *Id.*

226. *See In re Xacur*, 219 B.R. 956 (Bankr. S.D. Tex. 1998).

million from seven Mexican banks and one California bank to help finance their family's business.²²⁷ By September 1996, each loan was in default.²²⁸ Consequently, all eight banks filed an involuntary petition in a U.S. bankruptcy court in Houston, Texas.²²⁹

Shortly after the case was filed, the bankruptcy court commenced proceedings to determine the existence of federal court jurisdiction, the validity of the involuntary petitions, and the appropriateness of orders for the relief.²³⁰ On appeal, the U.S. district court found that the bankruptcy court had jurisdiction over the Xacur brothers.²³¹ It reasoned that jurisdiction was proper because the brothers were residing in Houston, their place of business was in Houston, and they held substantial amounts of property in the United States. Thereafter, the bankruptcy court commenced liquidation proceedings against the brothers and ultimately awarded the banks proceeds resulting from the liquidation.²³²

In May 2000, Mexico incorporated the Model Law into Mexican law through Chapter 12 of the *Ley de Concursos Mercantiles* (LCM).²³³ Afterwards, the Mexican Counsel to the U.S. Trustee filed a petition in Mexican court seeking recognition and enforcement of the U.S. bankruptcy proceedings against each brother as well as international cooperation.²³⁴

After a complex and highly disputed process, the Mexican court entered an order, granting the relief sought and international cooperation.²³⁵ Following recognition, the Mexican court granted measures to protect the estate's bankruptcy assets located in Mexico.²³⁶

The Xacur brothers then challenged recognition of the U.S. bankruptcy proceedings by the Mexican court.²³⁷ But, the Mexican court confirmed its decision. Against this holding, the Xacur brothers filed another action, which was later denied because the court found that the brothers did not suffer any constitutional harm.²³⁸ The brothers then appealed this decision to the Mexican circuit court.²³⁹

Before the circuit court could rule, Mexico's Supreme Court of Justice decided the constitutionality of the LCM. On November 16, 2005, the Mexican Supreme Court of Justice rendered a unanimous judgment, ruling that the Model Law does not violate the Mexican Federal Constitution.²⁴⁰ After analyzing the pleadings and the merits of the case, the Supreme Court of Justice found no legal reason to declare the Model Law unconstitutional.²⁴¹ To the contrary, the Supreme Court of Justice found that the Model Law does

227. EIR-database.com, <http://www.eir-database.com/download/caselaw/4/International-Caselaw—Alert-No-8—I-2006—January-6,-2006.pdf>.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

not violate the sovereignty and independence of Mexico; rather, it provides a legal instrument that makes an international insolvency system effective.²⁴²

The Mexican Supreme Court of Justice's decision is important for several reasons.²⁴³ The decision was the first case to recognize another country's insolvency proceeding under the Model Law.²⁴⁴ Also, the *Xacur* case clearly establishes that U.S. bankruptcy courts can commence insolvency proceedings against Mexican businesses with minimum contacts in the United States.²⁴⁵ Further, the case demonstrates that Mexico will enforce a U.S. bankruptcy court's decision by gathering the debtors' Mexican assets for later distribution to foreign creditors.²⁴⁶

C. THE EUROPEAN UNION INSOLVENCY REGULATION

Similar in substance to the Model Law, the European Insolvency Regulation (EIR), officially entitled "Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings," became effective in May 2002.²⁴⁷ Completed before the Model Law, the EIR served as the source of many of the Model Law's principle provisions.²⁴⁸ This part of the paper will provide a brief overview of the EIR, discuss the principal differences between the EIR and the Model Law, and then review several cases involving the EIR that will likely affect the way courts interpret the Model Law and Chapter 15.

1. *Brief Overview of the EIR*

a. Purpose

Like UNCITRAL's adoption of the Model Law, the EU adopted the EIR to facilitate efficient and effective cross-border insolvencies.²⁴⁹ The EIR does not seek to harmonize the varying insolvency laws of the EU's Member Nations.²⁵⁰ Rather, it attempts to provide a universal framework within which Member Nations can interact.²⁵¹

b. Concepts

The principal concepts introduced by the EIR are: (1) the debtor's COMI, (2) the rebuttable presumption that, for a company, its COMI is in the place of its registered office, and (3) the distinctions between main insolvency proceedings (which can only occur in the Member State of the insolvent entity's COMI) and secondary proceedings (which occur in other Member States where the insolvent entity has an "establishment").²⁵² Under the

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. http://www.iiiglobal.org/country/european_union/regulation.pdf.

248. Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 2 (2002).

249. See Council Regulation 1346/2000 European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160), pmbi., available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:EN:PDF> [hereinafter "EIR"].

250. See *id.*

251. See *id.*

252. See *id.*

EIR, an establishment is defined as any place of operation where the debtor carries out a non-transitory activity with human means and goods.²⁵³

c. Key Provisions

Article 3(1) defines the jurisdiction for main proceedings by reference to the debtor's COMI:

The courts of the Member States within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.²⁵⁴ In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.²⁵⁵

The EIR, like the Model Law, famously contains no definition of COMI, with paragraph 13 of the preamble only going as far as saying, "A 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."²⁵⁶

Territorial proceedings are defined in Article 3(2):

Where the centre of a debtor's main interest is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.²⁵⁷

Secondary proceedings are defined in Article 3(3): "Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings."²⁵⁸

The applicable law in insolvency proceedings is defined by Article 4(1): "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings.'"²⁵⁹ But, certain rights are excluded from this provision by Articles 5 through 15.²⁶⁰ These rights include rights *in rem*, such as security rights of a proprietary nature, setoff rights, reservation of title rights, and contracts of employment.²⁶¹

253. *Id.* art. 2(h).

254. *Id.* art. 3(1).

255. *Id.*

256. *Id.* pmbl.

257. *Id.* art. 3(2).

258. *Id.* art. 3(3).

259. *Id.* art. 3(4).

260. *Id.* art. 5-15.

261. Compare *id.* art. 3(3), with *id.* art. 5-15.

Articles 16(1) and 17(1) address uniformity and cooperation with respect to prior judgments by Member States.²⁶² Article 16(1) provides, “Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the time that it becomes effective in the State of the opening of proceedings.”²⁶³ Article 17(1) provides that “[t]he judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise.”²⁶⁴

Finally, paragraph 4 of the preamble discusses forum shopping.²⁶⁵ It states, “It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).”²⁶⁶

2. *Principal Differences Between the EIR and the Model Law*

There are several principle differences between the EIR and the Model Law. First, the EU has adopted the EIR as positive law.²⁶⁷ Second, unlike the Model Law, which is global in its application, the EIR’s application is limited to EU Member States.²⁶⁸ Finally, under the EIR, when a debtor’s COMI is within the EU, the EIR establishes choice-of-law rules, rules for cooperation among the relevant courts, and jurisdictional rules.²⁶⁹ While the Model Law also implements rules for cooperation and jurisdiction, it does not establish choice-of-law rules.²⁷⁰ This difference can be attributed to the fact that the EIR employs a parallel approach, which involves full parallel proceedings in both the foreign and local courts.²⁷¹ The Model Law, on the other hand, employs an ancillary approach, which implements short proceedings in the local court for purposes of assisting with the administration of the foreign main proceeding.²⁷²

3. *Cases Decided Under the EIR*

a. *ISA Daisytek SA*

Several cases involving the EIR will likely affect the way courts interpret the Model Law and Chapter 15.²⁷³ One such case is *ISA Daisytek SA*. In that case, the British High Court of Leeds commenced insolvency proceedings against ISA Daisytek, a French subsidiary of

262. *Id.* art. 16(1), 17(1).

263. *Id.* art. 16(1).

264. *Id.* art. 17(1).

265. *Id.* pmbl. ¶ 4.

266. *Id.*

267. Westbrook, *supra* note 248, at 2.

268. *Id.* at 2.

269. *Id.* at 3.

270. *Id.* at 14, 34, 36.

271. *Id.* at 11-12.

272. *Id.*

273. Int’l Caselaw—Alert, <http://www.eir-database.com/download/caselaw/4/International-Caselaw—Alert-No-8—I-2006—January-6,-2006.pdf>; see also Cour d’appel [CA] [regional court of appeal] Versailles, Sept. 4, 2003, no 03/05038, available at http://www.eir-database.com/judgements_detail.php?caseID=17.

British parent company Daisytek-ISA Ltd.²⁷⁴ The British court appointed Mr. Klempka, Mr. Taylor, and Mr. Green as administrators to the proceedings (British Administrators).²⁷⁵ Later, the Commercial Court of Pontoise ordered Daisytek into administration and appointed Maitre Valdman as administrator and Maitre Mandin as the representative for the creditors.²⁷⁶

Because the British proceedings prevented the opening of the insolvency proceedings in France, the British Administrators applied to have the Commercial Court's judgment set aside, but the Commercial Court denied the application.²⁷⁷ The Commercial Court reasoned that although the High Court commenced insolvency proceedings first, and the United Kingdom was a Member State, the British Administrators failed to follow the EIR, requiring the British proceeding to have jurisdiction as a main proceeding.²⁷⁸ Soon after, the British Administrators filed an application with the Court of Appeal of Versailles to set aside the Commercial Court's denial.²⁷⁹

On appeal, the Court of Appeal of Versailles held that the High Court of Leeds had properly commenced a main proceeding.²⁸⁰ The court reasoned that ISA Daisytek's COMI was in the United Kingdom.²⁸¹ In coming to this conclusion, the court paid particular attention to the fact that the German and French subsidiaries recognized the British proceeding as the main proceeding.²⁸² Given that the main interest was in the United Kingdom, the Court of Appeals concluded that the EIR required the Commercial Court to recognize the British proceeding and did not have authority to commence a main proceeding with respect to the same company.²⁸³

The case of *ISA Daisytek SA* may have significant effects on legal systems based on the Model Law. Like the EIR, the Model Law defines the foreign main proceeding as the proceeding that takes place in the country where the debtor's COMI is located, yet the term "center of its main interests" is undefined in Chapter 15. Under *ISA Daisytek SA*, recognition of a certain proceeding as the foreign main proceeding by parties-in-interests evidences that the country conducting the proceeding is where the debtor's COMI is located.

b. Co-Operation I

In *Co-Operation I*, a foreign representative filed several applications, requesting cross-border cooperation and communication, with the Regional Court of Loeben in Austria.²⁸⁴ The first application requested that the court dismiss the entire secondary insolvency pro-

274. Cour d'appel [CA] [regional court of appeal] Versailles, Sept. 4, 2003, no. 03/05038, available at http://www.eir-database.com/judgment_detail.php?caseID=17.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. See Landesgericht Leoben [LG] [Trial Court] Aug. 31, 2005, 17 S 56/05, available at http://www.eir-database.com/judgement_detail.php?caseID=125.

ceedings under Article 33 of the EIR.²⁸⁵ The second application requested that the court stay the secondary proceedings for three months under Article 33.²⁸⁶ But, the court denied both applications, reasoning that the trustee in the main proceedings did not make any proposals for liquidating the assets.²⁸⁷ The third application requested that, under Article 84, the court order the trustee in the secondary proceeding enter into a contract with the trustee in the main proceeding to ensure coordination and cooperation in both proceedings.²⁸⁸ The court, however, also denied this request as well, finding that the trustee in the secondary proceeding already had a duty to cooperate under article 31, and a separate court order was not necessary to impose this obligation.²⁸⁹

Applying *Co-Operation I* to the Model Law, *Co-Operation I* may help to solidify coordination and cooperation in legal systems that are based on the Model Law. Much like the EIR, the Model Law and Chapter 15 attempt to further cooperation and coordination between courts and foreign representatives throughout its many provisions. *Co-Operation I* makes clear that courts need not enter into separate contractual obligations to ensure that courts employ these fundamental objectives.

c. Susanne Staubitz-Schreiber

Another case that will probably affect the way the Model Law and Chapter 15 are interpreted is *Susanne Staubitz-Schreiber*.²⁹⁰ In that case, the debtor filed an application to commence consumer insolvency proceedings with the local German court in Wuppertal.²⁹¹ But, the court refused to open insolvency proceedings for lack of jurisdiction.²⁹² Intent on establishing jurisdiction to receive discharge in Germany, which was more favorable than other Member States, the debtor moved to Spain and appealed the court's decision.²⁹³ Despite the debtor's efforts, the German court again denied jurisdiction.²⁹⁴ The debtor then appealed this decision, arguing that jurisdiction can change after filing.²⁹⁵

On appeal, the Federal Supreme Court ruled that a debtor cannot establish jurisdiction after filing its application to commence insolvency proceedings.²⁹⁶ In support, the court presented three justifications for its decision.²⁹⁷ First, the court pointed out that courts should interpret Article 3 as requiring the applicant to establish jurisdiction with the court in which the petition was filed.²⁹⁸ Second, the court reasoned that, because the debtor could not have established a business within the few weeks following its move, the court could not consider Spain the debtor's establishment.²⁹⁹ Finally, the court concluded that

285. Int'l Caselaw—Alert, *supra* note 273, at 3.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. See Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 17, 2006, available at http://www.era.int/web/en/resources/5_2341_3083_file_en.4478.pdf.

291. Int'l Caselaw—Alert, *supra* note 273, at 4.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

the time for determining the debtor's COMI is the time of filing, so as to "avoid forum shopping."³⁰⁰

Susanne Staubitz-Schreiber may have a significant effect on courts' interpretation of the Model Law and Chapter 15. In particular, *Susanne Staubitz-Schreiber* demonstrates disapproval of debtors who move their assets for the purposes of receiving recognition and the automatic protections that accompany a foreign main proceeding. While the case does not expressly provide whether a debtor comes into disfavor only after filing a petition for recognition or if there is a specific time period in which a debtor must reside in a country before the debtor can form an establishment, *Susanne Staubitz-Schreiber* seems to indicate that the test is whether the debtor moves to another country solely to obtain recognition with the court.

d. B & C

In *B&C*, the debtor, B&C, a company incorporated under Italian law, obtained a loan from Immobiltrading, upon which B & C later defaulted.³⁰¹ Following B & C's default, Immobiltrading filed a petition with the Tribunal of Rome to declare B & C insolvent.³⁰² In its petition, Immobiltrading argued that the Tribunal had jurisdiction to open main proceedings over B & C under the EIR.³⁰³ Conversely, B & C contended that the Tribunal did not have jurisdiction because B & C transferred its registered seat from Rome to Luxembourg.³⁰⁴ Immobiltrading, however, responded by arguing the transfer to another country gave the court justification for finding the case was a matter of windup under Italian corporate law and not insolvency, giving the court clear jurisdiction.³⁰⁵

The Corte di Cassazione ultimately found Immobiltrading's argument persuasive, holding the case was a matter of windup, over which it had jurisdiction.³⁰⁶ In doing so, the court relied on Article 25 of the Italian Act on Private International Law, stating that the transfer of a registered office will result in the winding up of a company unless both countries agree on the effects of the transfer and the continuity of the legal entity.³⁰⁷ Since the Corte di Cassazione came to this conclusion, the court's decision has undergone much criticism for ignoring the issue of jurisdiction under the EIR and deciding the case under Italian corporate law.³⁰⁸

Despite the criticism *B&C* has received, the case may have an impact on legal systems based on the Model Law. Unlike *Susanne Staubitz-Schreiber*, the debtor in this case moved assets in order to avoid the court's jurisdiction. Nevertheless, the court established jurisdiction based on Italian corporate law while failing to address jurisdiction under the EIR. Accordingly, parties to a foreign insolvency proceeding based on the Model Law may use

300. *Id.*

301. See Cass., sez. un., 23 jan. 2005, n.1244, available at http://www.eir-database.com/judgement_detail.php?caseID=128.

302. Int'l Caselaw—Alert, *supra* note 273, at 5.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

B&C as precedent for the court lacking jurisdiction following a debtor's transfer of assets to another country.

e. Eurofood

Finally, the European Court of Justice's decision in *Eurofood* likely provides some insight as to how courts will interpret the Model Law and Chapter 15.³⁰⁹ In that case, Eurofood had registered offices in Dublin, Ireland, and transacted a vast majority of its business there.³¹⁰ Although Eurofood's parent company, Parmalat, an Italian company, was already involved in insolvency proceedings in Italy, Eurofood filed a petition to commence windup proceedings in Ireland.³¹¹ Concerned about forum shopping, the Irish court appointed a provisional liquidator. Consequently, the Irish liquidator notified the Italian administrator of his appointment.³¹² Later, the Italian court placed Eurofood into Italian extraordinary administration and appointed Parmalat's administrator as Eurofood's administrator.³¹³ The Italian administrator then sought a declaration of insolvency regarding from the Italian court with respect to Eurofood.³¹⁴ But, the Irish liquidator was only given notice shortly before the Italian hearing and was not given a copy of the Italian administrator's petition despite numerous requests and a contrary court order, conflicting with the right to a fair hearing.³¹⁵

Eurofood was subsequently declared insolvent, and the Italian court held that the Irish court's appointment of the Irish liquidator did not constitute the opening of a main proceeding, Eurofood's COMI was located in Italy, and the Italian proceeding was the main proceeding.³¹⁶ In contrast, at the windup hearing in Ireland, the Irish court refused to recognize the Italian court's insolvency proceeding.³¹⁷ The Irish court held that Eurofood's COMI was located in Ireland, the appointment of the Irish liquidator opened the main proceeding, and the Italian court should have recognized the Irish proceeding under Article 16.³¹⁸ As a result, the Irish court granted the windup order.³¹⁹ The Italian administrator subsequently appealed this decision.³²⁰

On appeal, the European Court of Justice concluded that the mere fact that Parmalat had its COMI in Italy and controlled Eurofood's economic decisions was an insufficient basis for overcoming the presumption that Eurofood's COMI was located in Ireland, where its registered office was located and it transacts business.³²¹ Additionally, the court concluded that a Member State may refuse to recognize an insolvency proceeding opened

309. See Case C-341/04, *Eurofood IFSC Ltd.*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML>.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

by another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard.³²²

Applying *Eurofood* to help determine how courts will interpret the Model Law and Chapter 15, the case provides guidance in several respects. First, courts may presume that a subsidiary debtor has its COMI wherever its registered office is located. Second, this presumption may be overcome by objective factors such as the subsidiary conducting business in another country where its parent company is located. Third, the mere fact that a parent company is headquartered in another country is an insufficient basis for overcoming the presumption that the subsidiary's COMI is located in the country where it is registered. Finally, legal systems based on the Model Law may decide to allow enacting countries to refuse recognition where the foreign court's decision to open the foreign proceeding was a breach of the fundamental right to be heard.

IV. Chapter 15

Like many other countries, the United States enacted legislation based on the Model Law, when it enacted Chapter 15 of the Bankruptcy Code in 2005.³²³ By enacting legislation based on the Model Law, the United States correctly adopted an international insolvency mechanism favoring an ancillary approach, as opposed to the EIR's parallel system. As such, Congress indicated a strong intent to give deference to foreign courts and foreign law, as well as preserve U.S. judicial resources. This part of the paper will examine Congress's express purpose for adopting Chapter 15, the scope of Chapter 15, and compare Chapter 15 to its predecessor, section 304.

A. PURPOSE AND SCOPE

1. *Purpose*

Section 1501 of the Code states Congress's purpose for adopting Chapter 15. Like the drafters of the Model Law, Congress expressly adopted Chapter 15 to: promote cooperation between U.S. courts, U.S. trustees, examiners, debtors, foreign courts, and foreign representatives; provide greater legal certainty for trade and investment; promote fair and efficient administration of cross-border insolvencies that protect parties-in-interest; protect and maximize the value of the debtor's assets; and facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment.³²⁴

2. *Scope*

Section 1501 also addresses the scope of Chapter 15. It states that Chapter 15 applies where: (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding, (2) assistance is sought in a foreign country in connection with a U.S. bankruptcy case, (3) a foreign proceeding and a U.S. bankruptcy case are pending concurrently, or (4) creditors or other interested persons in a

³²² *Id.*

³²³ Laura Shidlovitsky, *Adoption of Chapter 15: A Necessary Step in International Bankruptcy Reform*, 10 Sw. J.L. & TRADE AM. 171, 178 (2003).

³²⁴ § 1501(a).

foreign country request the commencement of, or participation in, a U.S. bankruptcy case.³²⁵

B. COMPARISON WITH SECTION 304

1. *Old Definitions*

a. "Foreign proceeding"

Chapter 15 implements variations to Section 304 in several obvious respects. For example, Congress amended the term "foreign proceeding" to mean

[A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.³²⁶

This amendment deleted the term's requirement that the foreign proceeding be in the country of the debtor's domicile, principal place of business, or where its principal assets are during the commencement of the proceeding.³²⁷

b. "Foreign court"

The term "foreign court" was also amended. Now, the term "foreign court" is defined as "a judicial or other authority competent to control or supervise a foreign proceeding."³²⁸ The implications of this change are that a proceeding controlled or supervised by a foreign official constitutes a foreign proceeding.³²⁹ It is unknown whether this change will make a remarkable difference from the prior case law under Section 304 because the case law recognized a foreign proceeding, regardless of whether it was controlled by a judicial authority or foreign official.³³⁰ Further, the revised definition includes interim foreign proceedings, such that the local court of the enacting country may recognize that the foreign proceedings that are commenced on an interim or provisional basis as well.³³¹ The revised definition also includes the condition that the proceeding is "collective" (i.e., eliminating proceedings that are commenced for the benefit of an individual creditor).³³²

c. "Foreign representative"

Congress also revised the term "foreign representative."³³³ The new definition states that a "foreign representative" covers "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of

325. § 1501(b).

326. 11 U.S.C. § 101(23) (2007).

327. Lee, *supra* note 64, at 179.

328. § 1502(3).

329. Lee, *supra* note 64, at 179.

330. *Id.*

331. *Id.*

332. *Id.*

333. See § 101(24).

such foreign proceeding.”³³⁴ The revised definition is more encompassing than the former definition but is consistent with its broad construction in section 304 hearings.³³⁵

2. *New Definitions*

a. “Debtor”

Just as the 2005 amendments revised some preexisting terms, such as “foreign representative” and “foreign proceeding,” the amendments also added new terms for the purpose of Chapter 15.³³⁶ For example, Section 1502(1) defines a Chapter 15 “debtor” as “an entity that is the subject of a foreign proceeding.”³³⁷ The prospective latitude of this definition is dealt with in Section 1501(c), which prevents some debtors from obtaining Chapter 15 relief.³³⁸ Notably, Section 1501(c)(1)’s exception, in connection with Section 109(b)(3), permits a foreign bank to commence an ancillary case in the United States, even if the bank does not have a branch or agency within the United States.³³⁹

b. “Foreign main proceeding” and “foreign non-main proceeding”

Chapter 15 also adds the terms “foreign main proceeding” and “foreign non-main proceeding.”³⁴⁰ Section 1502(4) provides that a “foreign main proceeding” is a “foreign proceeding pending in the country where the debtor has the center of its main interests.”³⁴¹ Section 1502(5) states that a “foreign non-main proceeding” is “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.”³⁴² Section 1502(2) defines “establishment” as “any place of operations where the debtor carries out a nontransitory economic activity.”³⁴³

Like the Model Law and the EIR, Chapter 15 does not define “center of main interests.”³⁴⁴ But, Section 1516(c) provides that “[i]n the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.”³⁴⁵

c. “Center of main interests”

Since Chapter 15’s enactment, the term “center of main interests” has been heavily criticized as being too imprecise.³⁴⁶ These critics contend that the term’s vagueness may give courts difficulty if, for example, a corporate debtor has its main operating facilities in one jurisdiction, its corporate offices in a second jurisdiction, and is registered in another

334. *Id.*

335. Lee, *supra* note 64, at 180.

336. *Id.*

337. § 1502(1).

338. Lee, *supra* note 64, at 180.

339. *Id.*

340. See § 1502(4)-(5).

341. § 1502(4).

342. § 1502(5).

343. § 1502(2).

344. 11 U.S.C. § 101 (2006).

345. § 1516(c).

346. Lee, *supra* note 64, at 183.

jurisdiction.³⁴⁷ In this situation, judges may disagree about whether evidence that the debtor has operating facilities in one jurisdiction and corporate offices in another jurisdiction is sufficient to overcome the inference in Section 1516(c) that the debtor's COMI is located in another jurisdiction.³⁴⁸ Furthermore, if evidence of the two alternative jurisdictions sufficiently rebuts the inference in Section 1516(c), Chapter 15 does not expressly provide the location of the debtor's COMI.³⁴⁹ Although Chapter 15 allows for the recognition of more than one foreign proceeding, and, therefore, the debtor could have ancillary foreign proceedings in all three jurisdictions, Chapter 15 permits the local court to recognize merely one of these proceedings as the foreign main proceeding.³⁵⁰

3. *Recognition*

By intending to make recognition simple and expedient, Congress introduced a new level of complexity to the recognition process that was not present under Section 304.³⁵¹ Chapter 15 does not prohibit concurrent insolvency proceedings in more than one enacting country if each country has assets of the debtor.³⁵² Nevertheless, Chapter 15 allows only one foreign main proceeding.³⁵³ Therefore, after receiving a petition for recognition from the foreign representative, each court must determine whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.³⁵⁴

Although deciding whether a foreign proceeding is a main or non-main proceeding seems rather clear, a closer examination reveals just the opposite.³⁵⁵ Section 1504 states that a case under Chapter 15 is "commenced by the filing of a petition for recognition of a foreign proceeding under section 1515."³⁵⁶ Section 1515 requires a foreign representative to present certain certified documents evidencing the foreign main proceeding and the appointment of the foreign representative by the presiding foreign court.³⁵⁷ Nevertheless, Section 1516(a) states that, if the filing document "indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume."³⁵⁸ The legislative history explains that Congress intended for Sections 1515 and 1516 to make recognition simple and expedient.³⁵⁹

When stating its intent for Sections 1515 and 1516 to make recognition simple and expedient, Congress failed to consider the process by which the court would need to decide whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.³⁶⁰ Section 1517(a) provides some clarity.³⁶¹ It states that a court's order rec-

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 184.

351. *Id.*

352. *Id.* at 183-84.

353. *Id.* at 184.

354. *Id.*

355. *Id.*

356. § 1504.

357. Lee, *supra* note 64, at 184.

358. § 1516(a).

359. Lee, *supra* note 64, at 184.

360. *Id.*

361. *Id.*

ognizes the foreign proceeding as a foreign main proceeding or a foreign non-main proceeding if "the foreign representative applying for recognition is a person or body" and "the petition meets the requirements of section 1515."³⁶² Furthermore, the presumption in Section 1516(a) indicates that there is no issue of whether the proceeding meets the definition of a foreign proceeding, under Section 101(24), when the court determines whether the proceeding qualifies as a foreign main proceeding or a foreign non-main proceeding.³⁶³ Irrespective of Congress's intent of making the recognition process easy and expedient, Sections 1515 and 1516 may make recognition somewhat confusing and may actually prolong the recognition process.

4. *Mandatory Recognition*

Unlike Section 304, Chapter 15 implements a mandatory recognition rule.³⁶⁴ This rule, found in Section 1517(a), requires that the local court recognize a foreign proceeding if the foreign proceeding and the foreign representative meet their definitional requirements and the filing requirements under Section 1515.³⁶⁵ In addition, Section 1517's legislative history provides that the local court's decision about whether to grant recognition is independent of the court's previous analysis under Section 304(c).³⁶⁶

The mandatory recognition rule is a substantial change from Section 304.³⁶⁷ Section 304 gave the local court of the enacting state discretionary authority to dismiss a petition even when the proceeding constituted a foreign proceeding.³⁶⁸ This is exactly what happened in *In re Toga Mfg.*³⁶⁹ There, the court denied relief to a foreign proceeding and dismissed the petition.³⁷⁰ Under Chapter 15, however, a local court may not have the same flexibility.³⁷¹ One such exception can be found in Section 1506. Section 1506 states, "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."³⁷² In other words, a court may decide not to recognize a foreign proceeding if recognition of the foreign proceeding would be contrary to U.S. public policy.³⁷³ The legislative history restricts Section 1506, however, stating that courts should limit such policy considerations to those considerations that are most fundamental.³⁷⁴

362. § 1517(a).

363. Lee, *supra* note 64, at 185.

364. § 1517(a).

365. Lee, *supra* note 64, at 185.

366. H.R. REP. NO. 107-3, pt. 1, at 83 (2001) [hereinafter "HOUSE REPORT"].

367. *Id.*

368. Lee, *supra* note 64, at 186.

369. See *In re Toga Mfg., Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich 1983).

370. See *id.*

371. *Id.*

372. See § 1506.

373. Lee, *supra* note 64, at 186.

374. *Id.*

5. *Automatic Effects*

The implications of the mandatory recognition rule come from another modification by Chapter 15.³⁷⁵ Pursuant to Chapter 15, the court's recognition of a foreign proceeding imposes certain automatic effects.³⁷⁶ Once the court recognizes a foreign proceeding as a foreign main proceeding, under Section 1520(a), the automatic stay and adequate protection come into effect with respect to the foreign debtor.³⁷⁷ Additionally, Section 363 (governing the use, sale, or lease of the debtor's property), Section 549 (allowing the trustee or debtor in possession to avoid transfer of postpetition property), and Section 552 (governing the effect of security interests in postpetition property acquired by the debtor) automatically apply to any transfer of interest in the debtor's U.S. property.³⁷⁸ This is a substantial difference from how ancillary proceedings functioned under Section 304, which did not impose the automatic stay and gave courts discretion in granting relief.³⁷⁹

Notably, imposing the automatic stay, adequate protection, and other effects upon the recognition of a foreign main proceeding brings to light another major difference between Chapter 15 and Section 304.³⁸⁰ Specifically, ancillary cases under Section 304 never implemented any other provisions of the Bankruptcy Code.³⁸¹ Instead, Section 304 functioned independently.³⁸²

Chapter 15 also increases the risk to U.S. creditors in an ancillary proceeding.³⁸³ No longer will courts rely solely on the factors codified in Section 304.³⁸⁴ Because recognition is mandatory, even if the foreign proceeding does not meet Section 304(c)'s factors, the automatic stay will apply to a foreign main proceeding immediately after recognition.³⁸⁵ But, not all of the automatic effects under Chapter 15 are unfavorable to U.S. creditors.³⁸⁶ For example, under Section 1520(a), U.S. creditors will receive the benefit of adequate protection in an ancillary proceeding.³⁸⁷

Moreover, Section 1520(a) incorporates the automatic stay in an ancillary proceeding.³⁸⁸ Most likely, the stay's incorporation created new questions for resolution because it will operate in the framework of a foreign proceeding.³⁸⁹ The legislative history of Section 1520(a) states that, by including the automatic stay, Section 1520(a) makes the stay's exceptions and restrictions applicable in an ancillary case, and a bankruptcy court has the power to terminate the stay for cause, including for a failure to provide adequate protection.³⁹⁰ Noticeably, neither the statutory text nor the legislative history indicate

375. *Id.*

376. *Id.*

377. *See* § 1520(a).

378. *Lee, supra* note 64, at 186.

379. *See* § 304.

380. *Lee, supra* note 64, at 187.

381. *Id.*

382. *See* § 304.

383. *Lee, supra* note 64, at 187.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *See* § 1520(a).

389. *Lee, supra* note 64, at 187.

390. *See* § 1520(a).

whether the court should consider Section 304(c)'s factors in determining whether there is cause for lifting or modifying the stay.³⁹¹

But, a modified version of section 304's factors is present in Section 1507.³⁹² Section 1507(a) states that, with limited exceptions, the court "may provide additional assistance to a foreign representative" if recognition is granted.³⁹³ The statute's legislative history explains that Congress intended for Section 1507 to allow the continued growth of international cooperation under Section 304 but did not intend for the provision to be a source for prohibiting or restricting relief.³⁹⁴

In examining Section 1507's legislative history, it is understandable how a court, when determining what constitutes "for cause" under Section 1520(a), might interpret Section 1507 as precluding the court from considering Section 304(c)'s factors.³⁹⁵ But, this would not be the correct interpretation of Section 1507.³⁹⁶ If, for example, a foreign proceeding would discriminate against foreign creditors or subordinate a claim in a manner that violates priority under the Bankruptcy Code, a court could arguably find such action meets the "for cause" exception under Section 362(d), considering the context of international insolvency.³⁹⁷ The legislative history uses a lack of adequate protection as an example for lifting the stay "for cause."³⁹⁸ This example, however, assumes that the foreign distribution scheme mirrors the Bankruptcy Code.³⁹⁹ Consequently, courts should not construe Section 1507's legislative history as precluding factors that might be relevant to creditor protection and the equality of distribution among creditors.⁴⁰⁰

Under Chapter 15, a court may also consider the breadth of the stay in a foreign proceeding when deciding whether to modify or lift the automatic stay.⁴⁰¹ Chapter 15 attempts to extend the effects of a U.S. bankruptcy filing to an ancillary case filing.⁴⁰² In drafting Chapter 15, Congress apparently realized that it is possible that the automatic stay or other effects may be broader under the laws of the foreign country.⁴⁰³ Because Chapter 15 requires the automatic stay be congruent to the foreign stay, secured creditors in an ancillary U.S. proceeding may be stayed in the U.S. proceeding from collecting its secured interest in collateral if the foreign main proceeding has already done so.⁴⁰⁴

Other issues will also develop regarding the scope of Section 1520. Section 1520(a)(1) differentiates between applying Section 362 "with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States."⁴⁰⁵ Based on this language, under Section 1520(a)(1), the stay will operate beyond U.S. borders in re-

391. Lee, *supra* note 64, at 187.

392. *Id.*

393. § 1507.

394. HOUSE REPORT, *supra* note 364, at 79.

395. Lee, *supra* note 64, at 192.

396. *Id.*

397. *Id.* at 188.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. § 1520(a)(1).

gards to the debtor's actions.⁴⁰⁶ But, the stay is limited to operating within the United States with regards to the debtor's property.⁴⁰⁷ This construction is confirmed by Section 1520(b)'s language, stating that Section 1520(a) "does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor."⁴⁰⁸ Accordingly, the application of the automatic stay provisions to an ancillary case will probably create issues that the courts have yet to consider under the Code.⁴⁰⁹

Similar to Section 1520, several other sections of Chapter 15 govern relief in ancillary proceedings.⁴¹⁰ In particular, Section 1519 gives a U.S. court authority to implement provisional relief before the court decides whether to grant the petition for recognition if the relief is urgently needed to protect the debtor's assets or the creditors' interests.⁴¹¹ Prior to Chapter 15's enactment, courts would grant such relief in Section 304 proceedings by issuing a temporary restraining order or a preliminary injunction.⁴¹² Section 1519 provides guidance as to whether the standard requirements for injunctive relief apply to temporary relief in an ancillary case.⁴¹³ Specifically, Section 1519 states that "[t]he standards, procedures, and limitations applicable to an injunction" apply to relief under Section 1519.⁴¹⁴ But, the breadth of the temporary relief may present several issues.⁴¹⁵ While Section 1520(a) includes the automatic stay and its exceptions and limitations, Section 1519 merely includes some exceptions and limitations of the automatic stay.⁴¹⁶ For example, Section 1519(d) states that, under temporary relief authority, "[a] court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this Section."⁴¹⁷ Section 1519(f) further states that the court may not use temporary relief to stay certain setoff rights that are not subject to the automatic stay under Section 362.⁴¹⁸ Thus, Section 1519 might make the scope of temporary relief broader than the automatic stay under Section 1520(a).⁴¹⁹

6. Discretionary Relief

Section 1521 governs the court's ability to grant discretionary relief after it recognizes a foreign proceeding as a foreign main proceeding or a foreign non-main proceeding.⁴²⁰ Its purpose is to provide the same breadth of relief that was previously available in a Section 304 proceeding.⁴²¹ Section 1521's legislative history provides, "This section does not ex-

406. Lee, *supra* note 64, at 189.

407. *Id.*

408. § 1520(b).

409. Lee, *supra* note 64, at 189.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. § 1519.

415. Lee, *supra* note 64, at 189.

416. *Id.*

417. § 1519(d).

418. Lee, *supra* note 64, at 189.

419. *Id.*

420. *Id.*, at 192.

421. *Id.*

pand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304 nor does it modify the sweep of sections 555 through 560.⁴²² Subsection (a) lists the various forms of relief the court may grant.⁴²³ Such relief includes staying the commencement or continuation of actions not otherwise stayed under Section 1520(a), issuing discovery orders, and granting additional relief available to a trustee under the Code.⁴²⁴ The explicit elimination of the Bankruptcy Code's avoidance provisions corroborates that a party-in-interest may not commence an ancillary proceeding to activate the Code's avoidance powers or avoidance powers under foreign law.⁴²⁵ Section 304's jurisprudence demonstrates that some courts presumed they could use the Code's avoidance powers in a Section 304 proceeding, while other courts held that they could only use an avoidance power derived from foreign law.⁴²⁶

7. *Turnover of Property*

Section 1521 governs the ultimate form of relief in an ancillary case: turnover of the foreign debtor's property to foreign representatives.⁴²⁷ Like Section 304, Section 1521 gives the local court discretion.⁴²⁸ Specifically, subsection (b) states that the test for determining if the local court should turnover the debtor's property is whether the local court believes the local creditors' interests are sufficiently protected.⁴²⁹

Because the test relies on the local court's decision as to whether the local creditors' interests are sufficiently protected, courts may rely on case law, favoring a territorial approach, previously decided under Section 304.⁴³⁰ Section 304's factors are easily incorporated in the subsection (b)'s test for whether U.S. creditors are sufficiently protected.⁴³¹ Indeed, Section 1521's legislative history explains that the statute "does not expand or reduce the scope of relief [formerly] available in ancillary cases under [Section] 304."⁴³² Therefore, it is reasonable to conclude that some courts will interpret Section 1521 to include Section 304's jurisprudence on whether turnover relief in an ancillary proceeding is proper.⁴³³

8. *Cooperation with Foreign Courts and Representatives*

Even though Chapter 15 has replaced Section 304, Congress incorporated a modified version of Section 304's factors into Section 1507.⁴³⁴ In explaining the legislative purpose of incorporating these factors, Section 1507's legislative history states that the factors are useful in terms of cooperation but are not meant to be a basis for denying relief otherwise

422. House Report, *supra* note 366, at 86.

423. See 11 U.S.C. § 1521(a).

424. Lee, *supra* note 64, at 190-91.

425. *Id.*

426. *Id.*

427. See § 1521.

428. Lee, *supra* note 64, at 190-91.

429. See 11 U.S.C. § 1521(b).

430. Lee, *supra* note 64, at 193.

431. *Id.*

432. House Report, *supra* note 366, at 86.

433. *Id.*

434. Lee, *supra* note 64, at 187.

available.⁴³⁵ Some argue that Section 1507's legislative history allows courts to incorporate case law interpreting the scope of relief under Section 304.⁴³⁶

Although Section 304(c)'s factors are found in Section 1507(b), and Section 1507(b)'s legislative history states that the factors' inclusion is not intended to be the test for denying or limiting relief otherwise available, Section 1507 allows for the possibility of additional assistance to foreign proceedings beyond what is covered in Sections 1519 through 1521.⁴³⁷ As such, the local court, in determining whether a creditor is sufficiently protected could consider these factors as the tipping point in determining whether to grant relief.⁴³⁸

Section 304(c)'s factors, while not included in Section 1521 itself, are explicitly incorporated in Section 1507(b).⁴³⁹ Section 1507 allows for additional relief outside of Sections 1519 through 1521.⁴⁴⁰ As previously mentioned, Section 1507's legislative history states that the statute's purpose is to further international cooperation initiated under Section 304 and not a reason for denying or limiting relief.⁴⁴¹ Nonetheless, one should not construe Section 1507 as precluding a court, in exercising its discretion, from considering a territorial 304(c) factor that is indirectly incorporated under the factors in Section 1507(b).⁴⁴²

9. Comity

When incorporating Section 304(c)'s factors into Section 1507(b), Congress made a substantial change.⁴⁴³ This change probably results from recommendations by academics suggesting that the role of comity in ancillary proceedings be made clear by eliminating comity from one of several factors and making it a determinative factor.⁴⁴⁴ Section 1507's legislative history explains the change as follows:

Although the case law construing section 304 makes clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.⁴⁴⁵

While it is unclear what the effect of this change will have on ancillary cases, the proponents of this change hope it precludes U.S. courts from taking the territorial approach like the one in *In re Toga Mfg.* and *In re Lineas Areas de Nicaragua S.A.*⁴⁴⁶ But, the legislative

435. *Id.*

436. *Id.* at 192-93.

437. *Id.* at 193.

438. *See id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.* at 193-94.

444. *Id.* at 194.

445. HOUSE REPORT, *supra* note 366, at 80.

446. Lee, *supra* note 64, at 193.

history to Section 1507 is less specific as to the effect comity now has on similar international insolvencies and if it is the determinative factor.⁴⁴⁷ Therefore, it is undeterminable as to whether the change would have modified *In re Toga Mfg.* or *In re Lineas Areas de Nicaragua S.A.* or whether the other factors still require equal consideration.⁴⁴⁸ Because comity is still not the determinative factor and because the other factors still require equal consideration, it is highly unlikely that the language change will have any substantial effect on ancillary cases.⁴⁴⁹

But, there is one significant change to comity in Chapter 15.⁴⁵⁰ Section 1509(c) states that "[a] request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517."⁴⁵¹ Congress adopted this provision to prevent foreign representatives from taking a direct approach to non-bankruptcy courts.⁴⁵² Under Section 304, and even before Section 304's enactment, non-bankruptcy courts entertained motions from foreign representatives in search of relief based on comity outside of Section 304 cases.⁴⁵³ Now, however, bankruptcy courts will entertain all requests for comity.⁴⁵⁴

V. Conclusion

Because courts have not yet applied Chapter 15, we must look to cases decided under the Model Law and the EIR and compare Chapter 15 to former Section 304 to determine how U.S. courts will interpret it. Looking at the cases decided under the Model Law and the EIR, it seems that U.S. courts will take a more universal approach in cross-border insolvency matters under Chapter 15. While U.S. courts will confront the issue of whether a foreign proceeding is a foreign main proceeding or a foreign non-main proceeding, several decisions applying the EIC have given U.S. courts guidance in this respect.

Of greater concern is Congress's inclusion of Section 304(c)'s balancing test in Chapter 15 and its effect. By enacting legislation based on the Model Law, the United States correctly adopted an international insolvency mechanism favoring an ancillary approach, as opposed to the EIR's parallel system. As such, Congress indicated a strong intent to give deference to foreign courts and foreign law, as well as preserve U.S. judicial resources. Yet, it is very possible that the inclusion of Section 304(c)'s balancing test may undermine Chapter 15's objective of moving toward a universal approach to cases ancillary to foreign proceedings. Like Section 304, Chapter 15 implements territorial factors for U.S. courts to rely on when deciding whether it should grant relief to a foreign representative, which includes turnover of the debtor's U.S. domestic assets—the ultimate goal of an ancillary case. Similar to Section 304, Chapter 15 may give U.S. courts too much

447. *Id.*

448. *See id.*

449. *See id.*

450. *Id.*

451. § 1509(c).

452. *Id.*

453. *Id.*

454. *Id.*

discretion to deny a foreign representative relief. Although one of the factors under Chapter 15 is comity, similar to Section 304(c), there is no express indication that one factor should be given significantly more weight than any other factor. Because Congress included Section 304's balancing test in Chapter 15 rather than relying on the Model Law's clear, concrete authority, the courts' application of Chapter 15 in ancillary cases may result in an inconsistent jurisprudence.

